

BRIEF ASSESSMENT OF THE CRIMINAL JUSTICE SYSTEM OF AZERBAIJAN

BY

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BACKGROUND

I was asked to do an assessment of the criminal justice system in Azerbaijan to assist the State Department in determining what type of law enforcement and rule of law assistance could be provided to Azerbaijan after the lifting of 907. I was in Azerbaijan for the U.S.-Azerbaijan Task Force on Economic Cooperation meeting on January 25, 2002. I remained in Azerbaijan for several days after that meeting and interviewed a number of people from the legal, NGO and expatriate communities about crime trends and the criminal justice system in Azerbaijan and returned to Washington, DC on January 30, 2002.

SUMMARY

There were four main issues of concern regarding the development of the criminal justice system in Azerbaijan that were consistently expressed throughout most of my meetings.

First, the government is believed to be much too powerful and no real checks and balances exist against the power of the executive and the President.

Second, there is no independent judiciary in Azerbaijan and an independent judiciary is essential to a functioning democratically based legal system.

Third, the police are corrupt and consistently resort to violence and torture when interrogating suspects.

Fourth, corruption is pervasive throughout society. Family and government connections are much more important than the law or the evidence in any given matter.

My impression based upon my relatively short time in Azerbaijan is that the criminal justice system has not developed much beyond the Soviet system. Many of the procedures and attitudes that I came across were familiar to me. They resembled the Russia and Ukraine of 1993. Some significant reforms have been introduced in the area of criminal procedure in Azerbaijan but there has not been any concerted effort on the part of the government to fully implement these reforms. I was left with the impression that the new criminal codes were passed more to please the Council of Europe than to actually have a significant reforming effect upon the operation of the criminal justice system. But it was clear that international opinion and

international standards matter to the Azeris, and as such, do have an impact on what is done in Azerbaijan.

CRIMINAL LAWS

Azerbaijan enacted new criminal and criminal procedure codes in September 2000 as part of the push to gain admittance to the Council of Europe. I have obtained a copy of the criminal procedure code in Russian and a copy of the criminal code is available in Russian, but I was unable to procure a copy during my stay in Azerbaijan.

Criminal Procedure Code

Important reform provisions in the new criminal procedure code include explanation of a suspect's rights by police, outlawing coercion by the police of a suspect's relatives during investigations, and a guarantee that a suspect will appear in court within 48 hours of arrest. The 48 hour rule seems to be enforced at this time. Indeed, a number of judges and prosecutors complained about it! This 48 hour time limit coheres with Council of Europe standards and has become one of the international standards in evaluating whether a system is democratically oriented and protects human rights.

Most of the provisions in the new Criminal Procedure Code appear, however, to be either not implemented or not completely implemented. This can be explained, in part, because there appears to have been no systematic approach or plan of implementation. Lawyers, judges, prosecutors, police and the population at large were expected to learn it on their own. As a consequence the adoption of the new code is not proceeding smoothly and in some cases - not at all.

In a most significant development, the new procedure code requires that the prosecutors obtain judicial approval of searches, seizures and arrests. Under Soviet criminal procedure, prosecutors could issue their own warrants. I am informed that, in practice, judges still issue warrants in 99 of 100 cases. The one case of refusal being when it is clear on the face of the application that it is not justified, or a judge wants to demonstrate that they are "independent." These outcomes are a result of a lack of independence by the judiciary and an apparent lack of standards for issuing warrants.

The new criminal procedure code also introduced adversarial procedure. This will require significant change in the roles of the judge, prosecutor and defense attorney at trial. A number of countries have done this in the former Soviet Union and it is a difficult adjustment because none of the current legal practitioners have been trained in adversarial procedure and none of the law schools teach it.

The use of plea agreements or plea bargaining was considered during the drafting process but was rejected out of concern about corruption and police coercion of confessions. Similar concerns were raised during the very lengthy drafting process of the criminal procedure code in Russia. The code that was signed by President Putin in December does include a provision for

plea bargaining , but only in cases with sentences of three years or less. It is intended that the process will be monitored and if it works well will be expanded to a larger set of crimes.

The new Azeri procedure code also provides for the use of bail but not for serious crimes that call for punishments of over five years in prison. Bail is set by the court. There are also provisions for alternative to incarceration before trial such as house arrest.

Some have criticized the code for placing requirements on legal practitioners that they cannot meet in practical ways. For example, the court or parties are required to provide a certain number of copies of legal documents but very few courts, prosecutor offices or defense lawyers have photocopying machines. It was also mentioned that some courts do not have courtrooms and trials and hearing must be done in a judge's office.

The criminal procedure code includes a provision for jury trials. No effort, however, has been made to implement jury trials in the courts. The law has no implementation schedule and jury trials will begin simply when the system is ready. I got the impression that this provision was included in the code for international consumption and there is not a serious desire for their implementation. Indeed, there does not seem to be tremendous support for jury trials in the legal community. Legal professionals frequently comment that they cannot see how average citizens, who are not legal experts and would comprise the majority of juries, can make such important decisions. There was also concern that jurors would be susceptible to bribes as are judges. This attitude was something I came across frequently in Russia in the early and mid-nineties. An attitude that has, for the most part, since changed in Russia with experience and education about the process over time.

Criminal Code

The new criminal code criminalizes torture as a specific offense with a sentence of 5 to 10 years for officials found to have used torture to extract confessions.¹ Torture of prisoners is a continuing problem. I was informed that a case was recently brought against a Baku police officer for allegedly torturing a suspect to death. This case is indeed an exception to the rule, but may indicate an opportunity to assist in implementing the provisions of the new code.

Draft Anti-Corruption Law

A draft anti-corruption law has passed the first reading of the Azeri parliament. It seeks to prevent conflict of interests by government officials primarily through the mechanism of financial reporting. Yet the law has many loopholes. Most importantly, there are no serious penalties as a consequence of violating the law. I had the opportunity to speak with the Minister of Finance about this law and emphasized that if the government was serious about addressing corruption there had to be serious penalties, including possible prison time, for the laws to have substantial impact. In addition to having laws with real penalties there also had to be a legitimate threat of prosecution to deter corrupt activities.

¹ Human Rights Watch World Report 2002: Europe & Central Asia: Azerbaijan, <http://www.hrw.org/wr2k2/europe3.html>.

PROSECUTORS OFFICE: THE PROCURACY

_____A new law on the prosecutory's office was passed in December 2000. (I was able to obtain a copy in Russian.) As part of this law a qualification exam was introduced for new prosecutors. Current members of the procuracy were grandfathered. While this is a positive development it only impacts about three to four new hires a year because the current turnover in the procuracy is relatively low. But only individuals who pass the exam can be hired by the prosecutors office.

Reforms have also significantly limited the role of the procuracy's powers of supervision. The procuracy was charged under Soviet law with the supervision of legality which would allow it to overrule acts of the Supreme Soviet and to intrude into just about every aspect of Soviet life. Supervision powers have been viewed by the United States and the Council of Europe as un-democratic. These powers have been used in the post-Soviet period by the procuracy to intervene in commercial disputes, selling their influence over the courts to the highest bidder. Curtailing these powers in Azerbaijan is, therefore, a significant development. Supervision also distracted the procuracy from focusing upon the investigation and prosecution of crime.

The procuracy has an international department that handles international cooperation, information sharing and extradition. Azerbaijan has cooperative agreements with the CIS countries, Turkey and Iran. They expressed their willingness to work together and cooperate with the United States, especially in the area of terrorism and narcotics trafficking.

COURTS

_____A new court system was created in September 2000. It is a four tiered system with courts of first instance, District Courts, Appellate Courts and Supreme/Cassational Court. There is also a Constitutional Court to which the Supreme Court and parliament can refer issues. There is no right of individual litigants to petition the Constitutional Court, but there is a move currently to allow such petitions. Such Constitutional Courts are common in Europe and the ability of individual litigants to petition the court varies. In Germany, they cannot. In Russia, they can.

The court system in Azerbaijan is not independent and is still under the control of the executive branch.² The courts are believed to be widely corrupt. Defense lawyers interviewed stated that bribery is rampant in the courts and that it is getting worse. Indeed, one defense attorney said it was easier to defend a criminal case under the Soviet system.

In Soviet times, there was "telephone justice" where the judge would telephone the local party official or Moscow before making a ruling. A number of legal professionals interviewed indicated that this system is alive and well in Azerbaijan. This is especially the case where the government, a government official or a relative of government official is involved. The decisions in these cases are not made by the court or the prosecutor but by the executive branch

² Nations In Transition: Azerbaijan 93 (2001).

according to several interviewees. In civil cases if the government, government official or the relative a government official is a party they will most certainly prevail. A local human rights advocate gave me the example of a 17 year old girl who fought of an alleged rapist with a knife, but she went to jail for assault because her alleged attacker was a relative of a local prosecutor.

One explanation as to why the government can exert such influence over the judiciary is the relatively short terms for judges. The lower court judges are appointed for five years, just as they were in Soviet times. Supreme Court and Constitutional Court judges are appointed for ten years. These relatively short terms of appointment are a method of controlling a judges's actions. If they want to remain on the bench they need to keep the executive branch happy because the president reappoints or appoints judges. The president appoints with the approval of parliament in the case of the Constitutional and Supreme Courts. In Russia, for example, where they have made significant progress in creating an independent judiciary, trial court judges are being appointed for life to avoid this sort of pressure and influence on the judiciary.

The courts in Azerbaijan are not self policing and a judge can be fired at practically any time according to a number of legal practitioners who were interviewed.

Qualification exams were given to judges in 2000. The process was similar to that used in Georgia with international organizations administering the exam. However, a second step was added that required each candidate that passed the exam to be interviewed by a panel of seven individuals appointed by the President. These proceedings were not monitored by international organizations and it is widely believed that the interviews were used as an opportunity for individuals to buy seats on the courts.³ One interviewee pointed out that a number of individuals with the highest test scores did not receive judgeships because they were unwilling to pay bribes or lacked the proper family connections. In France, for instance, there is an exam for judges but the highest test scores get to select from vacancies based upon their score. This French system is completely transparent unlike the system in Azerbaijan.

Constitutional Court

The Constitutional Court has issued 54 decisions since its creation. I was given a number of these decisions in English. One of the decisions defined "organized crime." While all courts are required to issue their decisions in writing it appears that only the decisions of the Constitutional Court and Supreme Court are published.

Judges Association

There is no judges association in Azerbaijan. I believe that gives it the distinction of being the only country in the former Soviet Union without a judges association. Such Associations are important because they can form the basis for judicial self-administration - a key to independence - and can provide a forum for continuing education for judges and means for lobbying in their interest which is crucial in the current environment of reform and change in Azerbaijan.

³ Nations In Transition: Azerbaijan 93 (2001).

DEFENSE ATTORNEYS

_____ One of the drafters of the new criminal procedure code told me that the key to the effective operation of the code is a strong and professional defense bar. And this should be one of the focuses of ongoing reform efforts within the criminal justice system in Azerbaijan.

Admission to Practice

There are three methods by which someone may represent clients in Azerbaijan, two of which are applicable to criminal cases. The first is by being a member of the Collegium, a Soviet era institution that functions as a type of government sponsored law firm. Members of the Collegium can represent criminal defendants and in theory should represent indigent clients. But cases for the poor are avoided by Collegium members because the government's fees for these cases are quite low - approximately thirty cents an hour. There are approximately 500 lawyers in the Collegium. The second method is by registering with the Ministry of Justice. There are approximately 250 lawyers registered with the Ministry. The third method applies only to civil matters. A person, even a non-lawyer, can obtain a power of attorney to represent someone in a dispute.

Draft Law on Defense Attorneys/Advocats

A new law has been drafted that pertains to Advocats -defense attorneys. The law has been drafted in consultation with the Council of Europe. The details of the law were not available but the major points of the legislation would create the necessity of passing a bar exam with specialty exams for areas such as criminal and corporate law. It would also create a new bar association. It is not known whether the bar would be self regulating.

Current Practice

Defense attorneys have very little power to assist their clients within the current system. By law, an accused is entitled to a defense attorney at the time of detention. In practice, this is rarely the case and a defense attorney may not be able to see their client for days or even weeks after detention. The defense cannot conduct its own parallel investigation and must ask the prosecution to obtain or introduce evidence. Suppression motions can be made but are not often successful because of the lack of an independent judiciary.

This system is a direct decedent of the Soviet system. In theory under the Soviet system, the prosecutor was to search for both evidence of guilt and exculpatory evidence. This was rarely done in practice in the USSR and appears to be the practice today in Azerbaijan.

I was told by several people that the most effective defense strategy for an accused is to work with the mass media. One of the few bright spots in several days of discussion was that a number of Azeris believed that the print media was relatively free and could engage to a certain degree in the struggle to curb the executive power of government.

Bar Association

A voluntary bar association currently exists that has no licensing power and is limited to civil law practitioners and primarily functions as a provider of continuing legal education.

POLICE

_____ I did not have the opportunity to meet with the police in any meaningful way. I had a short meeting with one local police chief but did not come away from that encounter with any meaningful information. The others I met with were more than willing to discuss the police. The interviewees were unanimous in their criticism of the police in Azerbaijan. They accused the police of routinely resorting to torture of suspects and witnesses. Suspects have died in police custody and what is a common explanation throughout the region - "because they leapt out of a window." Those interviewed believed that this behavior was the result of little control by the courts and prosecutors and because of woefully inadequate training and education for police. As mentioned above, torture is a crime under the new criminal code but the use of torture by the police is routine.

Human rights advocates indicated that the four month training program currently provided by the Azeris for new police officers was severely deficient. Police are not adequately trained in the fundamentals of police work, how to make an arrest, the use of firearms and there is little or no instruction in the laws they are meant to enforce.

NGOs have started some training programs in human rights for police in cooperation with the Council of Europe and they believed that they were useful and beneficial.

PRISONS

_____ I did not have the opportunity to visit a prison or meet with any prison officials. I was surprised to be told by a local human rights advocate that the prisons have significantly improved with separate facilities being recently prepared for women and juveniles. But others indicated there was a need for reform of the system in order for it to comply with international standards.

CRIME PROBLEMS

_____ There is a consensus that corruption is the number one crime problem in Azerbaijan. Some have even suggested that corruption is a threat to national existence it is so prevalent. Azerbaijan is notoriously corrupt. Transparency International's Corruption index ranks Azerbaijan as one of the most corrupt nations in the world. The government is an authoritarian regime with the President being very much in charge. Police brutality, election fraud, crackdowns on the media have all given Azerbaijan a reputation as a corrupt and lawless place. Azerbaijan's President is notable in part for having been one of the few individual leaders in the Soviet Union to have been punished for corruption under the Soviet regime.

A number of people with whom I spoke indicated that the smuggling of narcotics through Azerbaijan is on the rise. It was also mentioned that 20 percent of their territory is controlled by

the Armenians and that this contributes to the problem because they do not have control over their borders.

Azerbaijan has come under severe criticism for the administration of its elections. Fraud is rampant and is part of the government's strategy to maintain power. Some interviewees complained that many of the actions of election officials are criminal violations but that the President routinely issues an amnesty for such violations after elections.

Prostitution and trafficking in women are concerns that have not received much attention from Azeri law enforcement according to international human rights groups. Both are reputed to be on the rise according to some NGO groups within and without Azerbaijan. Those I met with in Azerbaijan, however, did not see these as significant crime issues for the country.

Some interviewees indicated that domestic violence was a severe problem in the country which would be consistent with what other countries in the region are experiencing.

CONCLUSION AND RECOMMENDATIONS

_____ It is easy to be pessimistic about the prospects for the creation of the rule of law in Azerbaijan, but I did see during my visit areas of opportunity. It is clear that what the international community has to say does have an influence on policy in Azerbaijan. It is not determinative, but it does have influence.

It is necessary to have, at the beginning, the criminal and criminal procedure codes translated into English so that all law enforcement assistance be provided in the context of Azerbaijan law.

The judiciary should be a focus of our efforts. Based upon my experience in other former Soviet countries, the judiciary is the best constituency to assist and to develop grassroots support for the rule of law. The judiciary in Azerbaijan must increase its independence if there is to be any progress towards that goal. Reform is in the interest of judges. their prestige rises along with their salaries and that makes them a good ally in the battle to reform an authoritarian system. As a first step, I would recommend a project that educates judges throughout the country about the principles of an independent judiciary and the rule of law. As a second and not necessarily separate step, I would recommend that support be given to the creation of an independent judges association in Azerbaijan.

We should assist in the implementation of the new criminal and criminal procedure codes through the conduct of training programs for judges, lawyers, prosecutors and police. The passage of these codes were significant steps in the right direction. We should also encourage the government to establish a group of professionals, perhaps the group that drafted the codes, to monitor its implementation and to recommend amendments based upon practical experience. As a separate part of this initiative, a jury trial project should be implemented that helps set the stage for the use of jury trials in Azerbaijan as called for by the new criminal procedure code.

Assistance should be given to reform the training of police to increase the professionalism of the force. Any training should include reform of the curriculum of the police academy and have an emphasis on the elimination of torture and the protection of human rights by the police.

We should focus our initial law enforcement assistance on the basics and expand from there once the many reforms that have been enacted into law are in place and operating.

Azeris should be included in regional programs and the international law enforcement academy programs to expose them to the reforms and practices of their neighbors. One of the things that struck me during my meetings was the intellectual isolation of many of the Azeris. I believe that exposure to other systems and reforms being taken by other emerging democracies would be of benefit to Azerbaijan.

MEETINGS

1. Ambassador Ross Wilson, US Embassy
2. Kelley Strickland, United States Agency for International Development
3. Joseph Hooten, RSO, US Embassy
4. Debra Juncker, US Embassy
5. David Whiddon, US Embassy
6. John Porter, ABA-CEELI
7. Douglas Francis, ABA-CEELI
8. Vidadi Mahmudov, Defense Attorney
9. Tofiq Samedov, Chairman of the Garadag District Court
10. Ahmed Aliyev, Sheriff of Garadag District
11. Hanlar Hajiyeve, Chairman of Constitutional Court
12. Leyla Yunus, Director of Institute of Peace and Democracy
13. Eldar Mamedov, Judge of Constitutional Court and Member of Working Group that drafted the new Criminal Procedure Code
14. Chingiz Bashirov, Chairman of the Absheron District Court

15. Eldar Nuriyev, Deputy Prosecutor General and Member of Working Group that drafted the new Criminal Procedure Code

16. Margo Squire, Country Director, The Eurasia Foundation

17. Daniel Matthews, Baker & McKenzie